IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1305 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SANJAYKUMAR @ SANYENDRAKUMAR PYARELAL VARMA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR DIVYESH JOSHI for MS SNEHA A JOSHI for Appellant(s) : 1,
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 30/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

1. Being aggrieved by the judgment and order dated 13.10.2003 passed in Sessions Case No. 2/02 by the Special Judge, Fast Track Court No. 4, Morbi, District Rajkot, this appeal has been filed by the appellant-convict. By virtue of the impugned order, the appellant has been convicted of the offences punishable under sections 376, 363, 366 and sec. 506(2) of the IPC and sentenced to undergo rigorous imprisonment for 8 years and a fine of Rs. 5,000/-, in default of payment of fine, 6 months' simple imprisonment for committing offence under sec. 376 of the IPC, RI for 2 years and a fine of Rs. 500, in default of payment of fine, simple imprisonment for 2 months for offence u/s 363 of IPC, RI for 2 years and a fine of Rs. 500, in default of payment of fine, 2 months' simple imprisonment for commission of offence u/s 366 of the IPC and for committing an offence u/s 506(2) of the IPC, he has been sentenced to undergo RI for 1 year and a fine of Rs. 500, in default of payment of fine, simple imprisonment for 2 months. All substantive sentences have been ordered to run concurrently.

1.1 It has been further directed that if fine of Rs. 5000/- is paid by the convict, the amount of fine so paid shall be paid to the victim.

2. In view of the judgment delivered by the Hon'ble Supreme Court in the case of **State of Karnataka v. Puttaraja**, AIR 2003 SCW 6429, name of the victim has not been stated in this judgment, but she has been

referred to as “the victim.”

3. The case of the prosecution, as stated before the Sessions Court, in a nutshell, is as under:

3.1 On 30.10.2001 around 2.30 p.m. at Morbi Taluka Police Station, complainant Ashokbhai Amarsibhai Solanki, brother of the victim, filed an FIR stating that he was having 5 sisters and one of them is the victim. On that day in the morning around 7'o clock, he had gone to Sanyo Sanitary Factory, where he was working, alongwith his mother and 2 sisters. His father had gone to Madusudan Ceramics for his work at village Dhuva. His younger sister, the victim, who was about 12 years old had gone to the primary school in village Lalpar, where she was studying in Std. VII. Alongwith the victim, her friend Bhavna was also going to the school.

3.2 On that day around 12 noon he had gone to Morbi in a rickshaw for getting a fridge repaired for Mahadev, the owner of his factory. Around 12.15 p.m. he got a message from the owner of Sanyo Sanitary Factory that his sister - the victim - was abducted by appellant - Manjaykumar @ Satyendrakumar Pyarelal Varma, who was also working in the same factory.

3.3 Upon getting information with regard to the victim's abduction by the appellant, the complainant went to the S.T. Bus Stand to search for them but he could not find the appellant. He has further stated

that the appellant was from U.P. or Bihar and his father's name was not known to him. He has also stated that the victim had put on a blue kurta and a grey odhani (a type of dupatta). He has further stated that around 9.50 a.m. during recess the appellant had abducted the victim by enticing her with a view to rape her.

3.4 In pursuance of the aforesaid FIR filed by the complainant, an offence had been registered at Morbi Taluka Police Station and investigation had been entrusted to PSI Shri M.V. Jhala. In the course of investigation, the victim as well as the appellant had been found from village Kadi . Father of the appellant Pyarelal Varma was working in Madusudan Ceramics and from his house in Kadi the victim as well as the appellant were found. The appellant ad been arrested and statements of the concerned persons had been recorded.

3.5 In the course of the trial the following important witnesses had been examined by the Sessions Court:

(1)The victim, PW No. 1 (Ex. 6)
(2)Ashokbhai Amarsibhai, PW No. 2 (Ex. 7)
(3)Bhavna D/o Karsanbhai, PW No. 3 (Ex. 8)
(4)Mahadevbhai Gayarambhai, PW No. 4 (Ex. 9)
(5)Babulal Gangarambhai, PW No. 12 (Ex. 23)
(6)Dr. Sushmaben Pradipbhai Dudhrejia, PW No. 17 (Ex. 45)
(7)M.V. Jhala, I.O., PW No. 6 (Ex. 14)

(8)Panch witnesses

3.6 The following documents/evidence were also considered by the Sessions Court.

(1)F.I.R. (Ex. 12)

(2)School leaving certificate of the victim, Ex. 24)

(3)Extract of General Register of the primary school, Lalpar (Ex. 25)

(4)Panchnama of clothes of the victim (Ex. 29)

(5)Arrest panchnama (Ex. 30)

(6)Report of FLS (Ex. 42)

(7)Serological report (Ex. 44)

(8)Case papers of th victim (Exs. 47/48)

(9)OPD case papers of the appellant (Ex. 51)

(10)Caste certificate of the victim (Ex. 45)

3.7 The victim, PW No. 1 (Ex. 6) had identified appellant – Manjay @ Satyendrakumar Pyarelal Varma – in the court room. She has stated in her deposition before the Sessions Court that on 30.10.2001, Manjay Pyarelal, the appellant had come to her house and had asked her to accompany him failing which he threatened that he would kill her brother. The appellant was living in a room in the premises of Sanyo Sanitary Factory. On the fateful day, when she had returned from school and when she was taking water from the water tap, the appellant had called her to his room but when she refused to go, she was dragged by the appellant and as the victim started

shouting she was given a threat that her brother would be killed if she would not go with him. After taking the victim to his room, the victim had been raped and was given threat that if she would tell the said fact to anyone he would kill her brother. Two or three days thereafter the victim's examinations had started. When she was waiting near a shop named Sahyog, the appellant had called her but as she did not go, the appellant had come to her and held her hand and asked her to go with him. He had further given a threat that if she would not accompany him he would kill her brother and he had forcefully taken her in a chhakda rickshaw (bigger rickshaw with more seating capacity). Because of the threat given by the appellant, she did not shout for help. Thereafter they had gone to an area near Morbi Housing Board and she was taken to Ahmedabad by a State Transport bus. They reached Ahmedabad in the evening and had gone to a hotel. Name of the hotel was not known to her. She thereafter changed her version saying that they could not get accommodation in the hotel and, therefore, the appellant had taken her to Kadi by an ST bus. They reached Kadi at night and she was taken to the factory, where father of the appellant was working. There, she was taken to a room and she was raped thrice. In spite of her shouting, nobody had come to help her. Around 10'o clock, her brother – the complainant – and the police had come there and thereafter she was taken for medical examination.

3.8 In the cross-examination the victim has stated

that she was knowing the appellant as he was staying in the vicinity where she was living. She has also stated that by making signs she was called by the appellant and the appellant was around 70-80 ft. away from the victim. Thereafter he caught her hand and she was taken in a chhakda rickshaw. In the rickshaw there were 6-7 passengers in addition to the driver. She had not shouted for help in the rickshaw and she had not made any effort to stop the rickshaw. For about 20 mts. they were in the rickshaw and thereafter they had come near Morbi Housing Board. In that area there are several shops and there was heavy traffic. Even in the bus, by which they had gone to Ahmedabad, there were several passengers and the ST bus had taken about 5 hrs. to reach Ahmedabad. The bus used to stop on the way at several bus stops. She did not remember whether for answering call of the nature she had got down from the bus but she had not made any complaint to anyone in the bus. After waiting for some time at Ahmedabad bus stand and after making inquiry about a hotel for staying, they had gone to Kadi . Even in the bus going to Kadi there were several passengers and she had not made any complaint with regard to her abduction by the appellant. In the cross-examination she had contradicted some of the statements which she had made before the police.

3.9 The complainant – Ashokbhai Amarsibhai Solanki – brother of the victim, PW No. 2 (Ex. 7) was also examined by the Sessions Court. He has stated that

when he was at Morbi in Trikonbaug, he was informed by Mahadev, the owner of factory where he was working, that his sister, the victim, had been abducted by the appellant. In the circumstances, he had made inquiries near ST bus stand, but he could not find them. He knew the appellant and he also knew that the appellant was from Bihar. Upon getting information with regard to abduction of the victim, he had filed a complaint. In the cross-examination he has stated that at the time of abduction he was not present and the appellant was staying in a room in the premises of Sanyo Sanitary Factory. He denied the suggestion that the appellant was wrongfully involved in the case simply because he was not from Gujarat State.

3.10 A friend of the victim, Bhavna, PW No.3 (Ex. 8) was also examined by the Sessions Court. She has stated in the chief that one girl had given the school bag of the victim to her and she was told that the school bag should be given at the residence of the victim as the victim was staying near her house. She was further informed that the victim had gone with a “bhaiyya”. She had given the school bag of the victim at her residence. She also stated that the victim had not returned to her house. She did not remember name of the girl who had given her the school bag of the victim. In the cross-examination she has denied the suggestion that she was making a false statement.

3.11 Mahadev Gayarambhai, PW No. 4 (Ex. 9) has been examined by the Sessions Court. He has stated that he was knowing the complainant as he was working in his factory. He has stated that sister of complainant Ashokbhai Amarsibhai Solanki, PW No. 2 (Ex. 7) had come to the factory and had told him that the victim had not come from the school and therefore Ashokbhai should be called immediately and therefore he had telephoned the complainant and told him that the victim was taken away by a “bhaiyya”. In the cross-examination he has stated that he came to know about the incident in the evening and he had not talked to Ashokbhai, PW No. 2 (Ex. 7).

3.12 M.V. Jhala, PSI, Morbi Taluka Police Station and the Investigating Officer, PW No. 6 (Ex. 14) has also been examined by the Sessions Cort. He has given details as to how the case was investigated by him and sec. 376 was added when it was reported that the victim was raped.

3.13 With regard to age of the victim, Babulal Gangaram, Principal of the primary school at Lalpar, has been examined. He has deposed that date of birth of the victim is 11.9.1987 as per the register of the school and School Leaving Certificate (Ex. 24) was given on the basis of the record maintained by the school. Thus, age of the victim was 14 years at the time when the offence had taken place.

3.14 Dr. Sushma Dudhrejia, PW No. 17 (Ex. 45) has

been examined by the prosecution. The said doctor-witness had examined the victim as well as the appellant. It has been stated by her that the victim was examined by her on 1.11.2001 around 11.15 a.m. and she referred the victim to a gynecologist and on the basis of case papers prepared by gynecologist Dr. Devinaben Oza, she has stated that hymen of the victim was torn and she was accustomed to have regular intercourse. The said witness had taken samples of blood, saliva, pubic hair etc. for sending the same to FSL for examination. Dr. Dudhrejia, PW No. 1 (Ex. 45) had also examined the appellant on 1.11.2001 and before the said witness the appellant had admitted that he had intercourse on 30.10.2001. She did not find any injury on the person of the appellant. She has stated that the appellant was capable of having physical intercourse.

3.15 Thus, there is evidence of the doctor to the effect that the appellant had admitted that he had intercourse on 30.10.2001.

3.16 Upon considering the entire evidence adduced before the Sessions Court, the learned Judge came to the conclusion that the offence alleged against the appellant had been committed by him and, therefore, the appellant has been held guilty of the charges levelled against him and has been sentenced to imprisonment and fine as stated hereinabove.

4. Learned advocate Shri Joshi appearing for the

appellant has mainly submitted that the victim was a consenting party as she had stated before Dr. Sushma Dudhrejia, PW No. 17 (Ex. 45) that even before 30.10.2001 she had sexual intercourse. The learned advocate has further stated that according to medical report the victim was accustomed to have regular intercourse. He has, therefore, submitted that because of the said fact it cannot be said that the appellant is guilty of committing rape.

4.1 He has also submitted that the Sessions Court has not properly appreciated the evidence and the conviction has been wrongly recorded. He has therefore submitted that the appeal be allowed and the order of conviction be quashed and set aside.

5. On the other hand, the learned APP has submitted that age of the victim was 14 years as per her birth certificate (Ex. 24). He has referred to evidence of Babulal Gangaram, PW No. 12 (Ex. 20), Principal of the primary school where the victim was studying. In the birth certificate (Ex. 24) the date of birth of the victim is shown as 11.9.1987, whereas rape had been committed on 30.10.2001. Thus, age of the victim was hardly 14 years when the incident took place and, therefore, even if the victim was a consenting party, it cannot be said that there was no rape. He has submitted that the Sessions Court has appreciated the evidence in a proper manner and the findings arrived at by the Sessions Court are just and proper. He has therefore submitted that the

appeal deserves to be dismissed.

6. We have heard the learned advocates and have carefully considered the evidence adduced before the Sessions Court.

6.1 It cannot be disputed that the age of the victim was only 14 years at the time when the offence had been committed. Therefore, the submission with regard to consent of the victim is absolutely irrelevant and cannot be considered.

6.2 We however find substance in the submission made by learned advocate Shri Joshi that the victim was a consenting party. It can be very well revealed from the fact tat the victim had gone with the appellant to Ahmedabad. In the cross-examination the victim has admitted the fact that the ST bus, by which they had come to Ahmedabad, was full of passengers. They tried to go to a hotel in Ahmedabad, but as they could not get accommodation, again they went to Kadi by an ST bus and she had admitted in the cross-examination that there were several passengers in the bus by which they had gone from Ahmedabad to Kadi. The victim could have very well shouted for help in the bus and even at the bus stand when she was in Ahmedabad or at Morbi housing board bus stand of ST from where, alongwith the appellant, she had gone to Ahmedabad. It also appears that when the alleged act of abduction had taken place, some of the friends of the victim were there with her. There also appears

to be some substance in the deposition of Bhavna, PW No. 3 (Ex. 8) to the effect that the school bag of the victim was given to her by a girl to hand it over to the family members of the victim. This fact also denotes that possibly the victim had planned to go away with someone.

6.3 Be that as it may, the fact remains that the victim was aged 14 years and even if she had voluntarily gone with the appellant, the appellant is guilty of the offences alleged against him because age of the victim was less than sixteen years.

7. For the aforesaid reasons it cannot be said that the findings arrived at by the Sessions Court are unjust and improper and therefore the order of conviction should be set aside. However, while upholding the impugned judgment, looking to the fact that the appellant is also a young man, who was hardly of 20 years at the relevant time, we feel that the punishment imposed on the appellant should be reduced to certain extent, particularly in view of the finding that the victim was a consenting party.

9. In the circumstances, the appeal is disposed of as partly allowed. The judgment and order dated 13.10.2003 passed by the Special Judge, Fast Track Court No. 4, Morbi, District Rajkot, in Sessions Case No. 2 of 2002 is modified. The sentence of rigorous imprisonment imposed for the offence u/s 376 of IPC is reduced from 8 years to 7 years. Sentence of

imprisonment and fine imposed for committing other offences by the appellant shall remain as they are.

(Anil R. Dave, J.)

(K.S. Jhaveri, J.)

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